Supreme Court, U.S.
FILED
JUN 4 - 2004
OFFICE OF THE CLERK

(3)

No. 03-1359

IN THE

Supreme Court of the United States

JOEY L. MITCHELL

Petitioner,

v.

GLENN CHAPMAN, RICK DERRICKSON, NAEWANA NICHOLS, WILLIAM J. HENDERSON, AND THE UNITED STATES POSTAL SERVICE

Respondents.

On Petition For Writ Of Certiorari To The Sixth Circuit Court of Appeals

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper Street
Lexington, KY 40507
(859) 281-6981
Counsel for Petitioner

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOEY L. MITCHELL, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully submits this Reply Brief in Support of his Petition for Writ of Certiorari, in order to address an issue raised in Respondent's Brief in Opposition.

I. *CONTRARY TO RESPONDENTS' ATTEMPT TO MINIMIZE THE CONFLICT, THE SPLIT IN THE CIRCUITS IS SUBSTANTIAL AND MUST BE RECTIFIED BY THIS COURT IN ORDER TO ASSURE UNIFORMITY.*

Respondents readily admit that a chasm exists between the circuit courts with regard to individual liability for public agency supervisors under the FMLA, but suggest, instead, that this Court sit idly while even ***more*** dissension and disagreement occur at the Circuit level. Such a proverbial "head-in-the-sand" approach is not warranted – especially when the issue has now been framed by the Sixth Circuit's rejection of ***both*** the Eighth Circuit's well-reasoned decision of *Darby v. Bratch*, 287 F.3d 673 (2002)(holding individual liability for public agency supervisors), as well as the oft-criticized decision rendered by the Eleventh Circuit, *Wascura v. Carver*, 169 F.3d 683 (1999)(holding no individual liability for public agency supervisors based upon previous Eleventh Circuit FLSA application).

By rejecting both previous decisions and by declaring that the Sixth Circuit intends to follow a third, completely unrelated approach from the other two Circuits, three of the eleven Circuits have now weighed in on this precise

issue – with all three taking drastically different approaches and reaching drastically different results. Such divergence among the Circuits is ***precisely*** the type of matter that should be resolved by this Court. Respondents' assessment that the issues raised herein would somehow "benefit from further ventilation in the circuits" is entirely without merit inasmuch as one of the primary purposes of seeking a Writ of Certiorari is to correct such inconsistencies at a time when the number of inconsistent results can be minimized and the matter can be properly addressed by this Court. *See, e.g., National Ass'n of Greeting Card Publishers v. U. S. Postal Service*, 103 S.Ct. 2717 (1983)(certiorari granted due to inconsistencies between the Second and District of Columbia Circuits).

More importantly, however, the Respondents have attempted to downplay the serious discrepancies which exist between the various courts that have addressed the issue presented on appeal by suggesting that the only courts to have addressed this particular issue are the Eighth Circuit and the Eleventh Circuit, and that the issue presented for Writ is thus simply not sufficiently widespread to warrant this Court's review. However, Respondents' position is erroneous, as is demonstrated by the ***vast*** number of district court opinions in addition to the three Circuit Court decisions that have addressed this issue and reached drastically differing results. *Compare Kilvitis v. County of Luzerne*, 52 F.Supp.2d 403, 412-13 (M.D.Pa. 1999)(same); *Carter v. USPS*, 157 F.Supp.2d 726, 728 (W.D.Ky. 2001)("[a]s modified by clause (A)(ii)(I) and (A)(iii), an "employer" includes both individuals and public agencies and therefore also includes individuals in public agencies. ***Common logic and standard rules of***

grammar permit no other reading"); *Johnson v. Fayette County*, 271 F.Supp.2d 1068 (W.D.Tn. 2003)("[t]he Court finds no rational basis to exempt [the] public sector [] from similar liability, where the language of the FMLA clearly expresses an intent to subject individuals to joint and several liability with their employers....a finding that public officials may be liable only in their official capacities would eviscerate the significance of Congress's clearly expressed intent to hold public officials individually liable"); *Cantley v. Simmons*, 179 F.Supp.2d 654 (S.D.W.Va. 2002)(same); *Morrow v. Putnam*, 142 F.Supp.2d 1271, 1272-73 (D.Nev. 2001)(A plain reading of the statute that supervisory government employees may be considered employers under the FMLA); *Meara v. Bennett*, 27 F.Supp.2d 288, 291 (D.Mass. 1998)("This language clearly suggests that individuals are contemplated as defendants...."); *Clay v. City of Chicago*, 1997 WL 106111, at *2 (N.D.Ill.1997) (denying motion to dismiss of public official defendant where allegations could be read to infer that public official "exercised supervisory authority over" plaintiff). *But see Keene v. Rinaldi*, 127 F.Supp.2d 770, 778 (M.D.N.C. 2000)(refusing to individual public agency supervisor liability although acknowledging that "it appears that a majority have found individual liability [for public supervisors]"[2]); *Wascura v. Carver*, 169 F.3d 683, 686-87 (11th Cir.1999)(finding government officers not liable in individual capacity under FMLA because Circuit precedent denies individual liability for government official in individual capacity under FLSA); *Carter v. Rental Uniform Serv. of Culpeper, Inc.*, 977 F.Supp. 753, 759 (W.D.Va.1997)(same).

As illustrated by the above, individual liability for

public agency supervisors, is in total disarray, with the Circuits being in complete disagreement, and the district and circuit courts acknowledging the divergence in the decisions and the crucial need for guidance and direction on this issue. Accordingly, Petitioner submits that the issue presented in the within Writ necessitates acceptance by this Court so as to provide uniformity to the decisions rendered in the differing Circuits and for direction to the lower courts that are routinely addressing the issue of individual liability for public agency supervisors under the FMLA.

CONCLUSION

WHEREFORE, based upon the foregoing, and based upon Petitioner's original Petition for Writ of Certiorari, Petitioner JOEY L. MITCHELL respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to manifestly establish individual liability for public agency supervisors as set forth in the underlying statute, and to set forth guidance on the impact of a previous dismissal based upon a failure to meet a condition precedent on subsequent claims.

Respectfully submitted,

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper St.
Lexington, KY 40588-0394
(859) 281-6981
Counsel for Petitioner

Dated: June 4, 2004